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CTI LEATHER SDN BHD

v.

HOE JOO LEONG & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: D5-22-1398-2004]
13 SEPTEMBER 2010

C

CIVIL PROCEDURE: *Pleadings - Pleading of material facts - Matters of evidence not required to be pleaded - Pleading that defendant was shadow director of company - Whether evidence showing that defendant was shadow director must be pleaded*

D

CIVIL PROCEDURE: *Res judicata - Cause of action estoppel - Earlier suit withdrawn without being heard and adjudicated on merits - Same issue raised in subsequent suit - Whether cause of action estoppel arose*

E

COMPANY LAW: *Directors - Fiduciary duties - Breach of - Whether breach of fiduciary duties established - Renting out of company property to inter-related persons at gross undervalue - Sale of company stock at gross undervalue - Directors receiving direct benefit - Whether shadow director liable for breach of fiduciary duties - Whether director who was unaware and uninvolved in breach may be excluded from liability - Whether directors in breach of fiduciary duties liable for losses incurred by company - Companies Act 1965, s. 4(1)*

F

COMPANY LAW: *Directors - Shadow directors - Director resigning from company but continuing to control running of company behind scenes - Other directors acting in accordance with directions of resigned director - Resigned director remaining signatory to company's bank accounts - Whether a de facto director - Whether de facto director liable to company for breach of fiduciary duties*

G

CONTRACT: *Ratification - Act of ratification - Whether withdrawal of court proceedings to avoid tenancy agreement and continuous acceptance of slightly increased rental payments amount to ratification of void tenancy agreement*

H

The first defendant ('D1'), the third defendant ('D3') and the fourth defendant ('D4') were directors of the plaintiff company. D1 was appointed a director of the plaintiff on 15 March 1999 and the Managing Director ('MD') on 30 September 1999. D3 was a director from 11 January 1993 until his resignation in 30 September 1999. Despite his resignation he remained a cheque signatory of the plaintiff. D4 was a director of the plaintiff from 1 September 1999 until 29 September 2000. Due to disputes between the shareholders, the plaintiff was wound up and PW1 was appointed as liquidator. PW1 found that the plaintiff had

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sustained accumulated losses and therefore brought the present action against D1, D3 and D4, claiming that they had acted in breach of their fiduciary duties as directors of the plaintiff in three distinct instances. Firstly, PW1 claimed that they had entered into tenancy agreements for the rental of the plaintiff's property at a gross undervalue with tenants inter-related to D3. Secondly, PW1 claimed that the plaintiff had acquired stock comprising 1515 metres of 'Dream Tex' material from one TH Jaya Marketing ('THJM') at RM300 per metre and had sold it for RM9 per metre, *ie*, at a gross undervalue. D3 was the sole proprietor of THJM. However D1 and D3 contended that this was because the quality of the stock had deteriorated due to compromised storage. Thirdly, PW1 claimed that D1, D3 and D4 caused the plaintiff to purchase 10,020 pieces of prayer mats which were paid for in full but this stock had simply disappeared. D1 contended that the prayer mats were sold to a company known as AL Auto Supplies Sdn Bhd which was wound up without paying the balance price due for the goods. It was the plaintiff's case that notwithstanding D3's resignation from the plaintiff on 30 September 1999, he continued to control the running of the company 'behind the scenes' and that D1 had acted in accordance with the directions and instructions of D3. It was thus submitted that D3 remained a director within the definition in s. 4 of the Companies Act 1965 ('CA'). The issue that arose for determination was whether D1, D3 and D4 acted in breach of their fiduciary duties. In the statement of claim, the plaintiff pleaded that despite his resignation, D3 continued to control the running of the company 'behind the scenes' and that D1 acted in accordance with the directions of D3. At trial, the plaintiff adduced evidence that D3 remained as a signatory to the plaintiff's bank accounts and had issued cheques. D3 took objection that this evidence was inadmissible as the plaintiff failed to plead the same. It was further submitted that the principles of *res judicata* applied and PW1 was precluded from raising issues that were raised in a previous application filed to avoid the tenancies and which was subsequently withdrawn. The defendants also claimed that the withdrawal of the previous applications and the acceptance of rental at a slightly increased rate, which was still well under the market rate amounted to ratification of the tenancies by PW1.

Held (allowing claim with costs):

(1) The matters raised by the liquidator in support of his contention that D3 remained a 'shadow' director within the definition of a director in CA amounted to matters of evidence rather than material particulars. The plaintiff had set out sufficient particulars to enable D3 to comprehend and prepare his case in response to the plaintiff's claim. Thus, D3's objection was dismissed and the evidence was admissible. (para 17)

(2) D3 remained a *de facto* director of the plaintiff notwithstanding his 'resignation', as borne out primarily by the fact that he remained a cheque signatory until a provisional liquidator was appointed in 2001. D1 was a director who acted entirely at the behest of D3, not being able to function independently or to carry out the functions of MD so as to safeguard the interests of the plaintiff. (paras 56 & 57)

(3) D3 knowingly allowed the plaintiff's premises to be tenanted out at an undervalue, as a consequence of which he derived a direct benefit. (para 63)

(4) D3 remained a 'director' within the definition in s. 4(1) of the CA. He, like D1 was in breach of his fiduciary duties and was liable to the plaintiff for the losses suffered as a consequence of the rental of the plaintiff's premises at an undervalue. (para 65)

(5) The application filed to avoid the tenancies was never heard and adjudicated upon as it was withdrawn. In other words it was not heard on its merits. Hence, cause of action estoppel did not arise. As for issue estoppel, similarly it could not be said that the issue of whether the directors in the instant case had acted in breach of their fiduciary duties in renting out the plaintiff's premises to known or related third parties at a gross undervalue, has been previously litigated or adjudicated upon. There has been no litigation finally precluding PW1 from pursuing his claim. (para 73)

(6) The fact that PW1 chose to pursue the monies due to the plaintiff by instituting an action against the directors, and in the interim ensured that all rentals were collected, did not amount to a ratification of the tenancies. PW1 was ensuring that all monies due to the company were duly collected. The loss suffered by the plaintiff as a consequence of rental of its premises at an undervalue was not 'waived' by PW1 as a consequence. (para 76)

(7) In the previous winding up proceedings, a finding was made that the plaintiff had overpaid THJM for the Dream Tex stocks. Hence, the issue of whether or not the Dream Tex stocks were paid for by the plaintiff did not arise for adjudication again in this proceedings. To allow this same issue to be relitigated would amount to an abuse of the process of this court. Estoppel and *res judicata* arose in relation to this issue. (para 87)

(8) The very material particular pertaining to the 'deterioration' of the Dream Tex stock had not been pleaded. There was no mention in any of the records of this material having deteriorated. This threw grave doubt on the veracity of the directors' contention that these stocks were defective, necessitating disposal at a gross undervalue. Hence, D1 and D3 were responsible for the losses incurred by the plaintiff as a consequence of the sale of the Dream Tex stock at a gross undervalue. (para 93)

(9) D4 was unaware and uninvolved in the entirety of the matter pertaining to the Dream Tex stocks. He was not in breach of his fiduciary duties. He was therefore not liable for the losses thus incurred by the plaintiff. (para 97)

(10) D1, D3 and D4 did not act in breach of their fiduciary duties in failing to account for the 10,020 prayer mats. The directors had put forward a reasonable and plausible explanation for the stock, namely that it was sold and delivered to AL Auto but that the entity has not paid for the same. There was insufficient evidence to prove that this transaction was a sham. (para 104)

(11) D1 and D3 were jointly and severally liable to the plaintiff in the sum of RM609,950 being losses incurred by the plaintiff as a consequence of their acts amounting to breaches of fiduciary duty on their part. The costs of this action were to be borne by D1 and D3. (para 109)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Ali Tan Sri Abdul Kadir & Ors v. Simpang Empat Plantation Sdn Bhd [2008] 5 CLJ 305 FC ***(refd)***

Dato' Vijay Kumar Natarajan v. Choy Kok Mun [2010] 5 CLJ 443 HC ***(refd)***

Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors [2001] 7 CLJ 489 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 132, 218(1)(i), 304
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 18 r. 7

For the plaintiff - CH Toh; M/s Azman Davidson & Co
For the 1st, 3rd & 4th defendants - PY Tia (Pusapawati Rosman & KH Chong with him); M/s William Leong & Co

Reported by Amutha Suppayah

JUDGMENT

Nallini Pathmanathan J:

[1] The plaintiff is a private limited company which carried on the business of general trading more particularly in relation to leather and PVC leather materials. The first defendant, Hoe Joo Leong ('D1'), the third defendant, Chin Cheen Foh ('D3') and the fourth defendant, Chiam Han Twee, ('D4') are or were at various times directors in the plaintiff.

[2] D1 was appointed a director of the plaintiff on 15 March 1999 and the Managing Director on 30 September 1999. D3 was a director of the plaintiff from 11 January 1993 until his resignation in 30 September 1999. He remained a cheque signatory of the plaintiff notwithstanding his resignation. D4 was a director of the plaintiff from 1 September 1999 until 29 September 2000.

[3] As a consequence *inter alia* of disputes between the shareholders of the plaintiff, two of the shareholders, namely one Ng Yok Gee and Foong Seong Thye filed a winding-up petition pursuant to s. 218(1)(i) of the Companies Act 1965 in the High Court in Kuala Lumpur against the plaintiff. The plaintiff was placed under provisional liquidation on 11 July 2001 *vide* Winding Up Petition No: D5-28-57-2000 and one Ong Tee Chew was appointed provisional liquidator. He officially took office on 30 July 2001. Subsequently a winding-up order was made against the plaintiff *vide* Winding-Up Petition No. D5-28-57-2000 on 11 October 2001, after which the said Ong Tee Chew, PW1 was appointed as liquidator ('the liquidator'). When the liquidator took over the affairs of the plaintiff as provisional liquidator, he noted that the plaintiff had sustained a net loss of RM1,156,097 for the year ended 31 January 2001 with accumulated losses of RM1,455,313 according to unaudited management accounts. In short the plaintiff was no longer a going concern.

[4] This action is brought by the liquidator against all the defendants, save for the second defendant in respect of whom this claim has been discontinued. Essentially the liquidator complains that D1, D3 and D4 have acted in breach of their fiduciary duties as directors of the plaintiff in three distinct instances. It is these complaints that comprise the subject matter of this claim. In brief, the liquidator complains that:

(i) D1, D3 and D4 acted in breach of their fiduciary duties as directors by entering into tenancy agreements for the rental of the plaintiff's property, namely a one and a half storey building, at a gross

undervalue with tenants or entities that are inter-related to D3. The liquidator complains that as a consequence, the plaintiff has suffered losses amounting to no less than RM174,200, as this property could have been tenanted out at considerably higher rental rates over the same period and brought in this quantum of revenue for the plaintiff. The defendants deny this contention maintaining strongly that there was no tenancy at an undervalue;

(ii) Secondly, the liquidator found, upon going through the limited documents of the plaintiff, a stock card which discloses that the plaintiff had acquired stock valued at RM454,500 on 25 November 1999 from one TH Jaya Marketing. D3 is the sole proprietor of TH Jaya Marketing. The liquidator contends that D1 and D3 caused the plaintiff to purchase this stock comprising 1515 metres of 'Dream Tex' stock from TH Jaya Marketing or D3 at RM300 per metre. His complaint is that 1500 metres of the 'Dream Tex' stock was sold to a party identified only as 'SKCC' for RM9 per metre, ie, at a gross undervalue. There is no documentation moreover to support this 'sale'. He alleges that this is another instance of D1, D3 and D4 acting in breach of their fiduciary duties. In response, D1 and D3 contend that when these stocks were sold to 'SKCC' the stock had deteriorated to such a poor quality due to compromised storage, that they were fortunate to have found a buyer for that price. Further both D1 and D3 point to the fact that there is no evidence of payment from the plaintiff to TH Jaya Marketing for the stock. In other words, they deny that the plaintiff paid TH Jaya Marketing for the Dream Tex stocks. Accordingly they deny any breach of fiduciary duty in this regard;

(iii) The third complaint by the liquidator is that sometime in October 1999, D1, D3 and D4 caused the plaintiff to purchase 10,020 pieces of prayer mats from TH Jaya Sdn Bhd at RM63 per piece at a total cost of RM631,260 as evidenced by invoices issued by TH Jaya Marketing. Although the plaintiff's records disclose that these prayer mats were paid for in full, there is no official record of the plaintiff having sold these mats to any other party subsequently. There is also no physical or tangible evidence of these prayer mats being stored with the plaintiff either. In short, it appears that this stock has simply disappeared. D3 responds to this allegation by pointing out that at this time he was no longer a director of the plaintiff and has no knowledge of what the plaintiff did with the prayer mats. D1 responds by stating that the prayer mats were sold and delivered to a company known as AL Auto Supplies Sdn Bhd which paid a cash deposit of RM30,000 for the

goods but subsequently failed to pay the balance price due for these goods. Accordingly D1 maintains that legal action was instituted against the said AL Auto Supplies Sdn Bhd and the entity wound up. The directors therefore deny any wrongdoing in this regard.

[5] Additionally the plaintiff contends that D1, D3 and D4 carried out the business of the plaintiff for a fraudulent purpose with a view to defeating the interests and rights of unsecured creditors. In this context, the plaintiff seeks a declaration to that effect in addition to the damages sought above as well as costs. The defendant directors deny any such fraudulent conduct strongly.

[6] *Vis-a-vis* D3, it is the plaintiff's case that notwithstanding D3's resignation from the plaintiff on 30 September 1999, he continued to control the running of the company 'behind the scenes' and the 1st and 2nd defendants were accustomed to act in accordance with the directions and instructions of D3, such that for all intents and purposes, D3 remained a director within the definition in s. 4 of the Companies Act 1965. Section 4 defines a 'director' as follows: 'includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act ...'

[7] The foregoing therefore comprises the entirety of the issues before this court, namely whether:

(i) D1, D3 and D4 acted in breach of their fiduciary duties in entering into tenancy agreements with entities related to D3 at a gross undervalue resulting in loss to the plaintiff in the sum of RM181,68;

(ii) D1 and D3 acted in breach of their fiduciary duties in disposing of substantive quantities of a stock known as 'Dream Tex' procured from TH Jaya, which is related to D3 and sold at a gross undervalue to a third party, causing the plaintiff to suffer substantive loss; and

(iii) D1, D3 and D4 acted in breach of their fiduciary duties in disposing of stock comprising 10,020 pieces of prayer mats purchased from TH Jaya Marketing at a cost of RM631,260 but failing to account for this stock in terms of sale or otherwise, thereby causing substantive loss to the plaintiff.

[8] Prior to considering the salient facts in relation to each of these issues it is relevant to consider the law relation to directors' duties.

The Law

[9] Section 132 of the Companies Act 1965 sets out the statutory position on director's duties under common law and in equity.

[10] In the authoritative text by Walter Woon on *Company Law* the learned author states:

> ... A director has three broad categories of duties: fiduciary duties, duties of skill, care and diligence and statutory duties ... ' He goes on to state that the word 'honestly' in s. 132 of the Act '... covers a multitude of rules evolved over the last century or so regarding what are classed as directors' fiduciary duties. These can be reduced to three basic propositions:
>
> Firstly, a director must act in what he honestly considers to be the company's interests and not in the interests of some other person or body. This is a director's main and overriding duty at common law; Secondly, a director must employ the powers and assets that he is entrusted with for proper purposes and not for any collateral purpose; Thirdly, a director must not place himself in a position whereby his duty to the company and his personal interests may conflict.'

[11] The foregoing enunciates in a nutshell the fiduciary duties of a director at law. Keeping in mind these duties imposed upon a director, each of the three issues set out above will be considered in turn.

[12] Prior to doing so, however it is necessary to consider objections on pleadings taken by the learned counsel for D3 in relation to the plaintiff's contention that D3 remained a 'shadow' director within the definition of the Companies Act 1965 despite his resignation on 30 September 1999.

D3's Objection To Portions Of The Liquidator's Witness Statement

[13] In the statement of claim, the plaintiff has pleaded *inter alia* in para. 5 that D3 was a director of the plaintiff from 11 January 1993 up to 30 September 1999 when he resigned. D3 is a shareholder of the plaintiff holding approximately 10.67% of the total shareholding. The plaintiff further pleads at paras. 6 and 7 of its statement of claim that D3 was at all material times the main controller of the plaintiff and that despite his resignation on 30 September 1999, D3 continued to control the running of the company 'behind the scenes' and the 1st and 2nd defendants were accustomed to act in accordance with the directions and instructions of the 3rd defendant. The plaintiff further pleaded that for all intents and purposes the 3rd defendant remained a director of the plaintiff within the definition of the Companies Act 1965.

[14] At trial, the plaintiff adduced evidence through the liquidator in his witness statement to support the foregoing contention by stating *inter alia* that:

(a) D3 remained one of the two signatories to several of the plaintiff's bank accounts notwithstanding his resignation;

(b) D3 had through one TH Jaya Marketing where he is the sole proprietor, issued four cheques dated 28 January 2000 to pay the plaintiff's creditors;

(c) D3 had signed a cheque dated 13 October 1999 made out to the Inland Revenue;

(d) D3 was a signatory to a new bank account of the company opened with a bank on 20 December 1999, after his resignation on 30 September 1999.

[15] D3 through his counsel objects to the liquidator's evidence setting out these facts maintaining that the evidence should not be admitted as the plaintiff failed to plead the same, thereby offending O. 18 r. 7 of the RHC 1980. In essence D3 maintains that the foregoing matters amount to material particulars which ought to have been pleaded. As a consequence D3 maintains that he is prejudiced by the failure to plead these material particulars. He further contends that the absence of these material particulars renders the statement of claim bad in law, and that this cannot be made good by affidavit evidence. In support of his contention D3 cites *inter alia*, *Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors* [2001] 7 CLJ 489 and *Dato' Vijay Kumar Natarajan v. Choy Kok Mun* [2010] 5 CLJ 443.

[16] The plaintiff on the other hand submits that its pleadings are more than adequate and that the liquidator's evidence in his witness statement pertaining to the four matters set out above comprise evidence that need not be pleaded rather than material particulars which need to be pleaded.

[17] I have considered the submissions of both counsel. It appears to this court that the matters raised by the liquidator in support of his contention that D3 remained a 'shadow' director within the definition of a director in the Companies Act 1965, amount to matters of evidence rather than material particulars. It further appears to this court that *vide* paras. 6 and 7 the plaintiff has set out sufficient particulars to enable D3 to comprehend and prepare his case in response to the plaintiff's claim. In essence the plaintiff contends that D3 remained in control of the affairs of the plaintiff notwithstanding his resignation as director and that this is borne out by the fact that D1 and D2 acted at his behest.

The matters pertaining to the cheques and D3's role as a cheque signatory comprise the evidence supporting the contention of his being a shadow director within s. 4 of the Act. It is trite that evidence need not be pleaded, only material particulars. In any event it is difficult to envisage how D3 can be said to be 'surprised' or 'prejudiced' by the narration of events well within his knowledge. D3 must of course know that he remained a cheque signatory in the plaintiff, that he signed a cheque dated October 1999 in favour of the Inland Revenue for the plaintiff etc. It cannot be said that he is taken by surprise by acts he himself carried out on behalf of the plaintiff, notwithstanding his resignation. Finally if D3 required further details he could have sought further and better particulars, which he failed or chose not to do. In all these circumstances I am of the view that there is no basis for D3's objection to the adducing of evidence to support the plaintiff's contention that he remained a director of the plaintiff behind the scenes despite his resignation. Accordingly this objection is dismissed, and the evidence of the liquidator is held to be admissible.

[18] Turning now to the first issue:

Issue (I): Did D1 And P3 Act In Breach Of Their Fiduciary Duties In Entering Into Tenancy Agreements With Entities Related To D3 At A Gross Undervalue Thereby Causing Loss To The Plaintiff In The Sum Of RM174,200?

[19] In his examination in chief the liquidator pointed to the undisputed fact that the plaintiff was at the material time the owner of a one and a half storey building known as No. 5, Jalan 2/108C, Taman Sungai Besi, 57100 Kuala Lumpur. On 1 July 1999 the plaintiff entered into tenancy agreements with two groups or categories of tenants in respect of the said building. It is significant to note that the said building also comprises the office and business premises of the plaintiff.

[20] One of the tenants to whom the property was rented out was one TH Jaya Marketing, which is a sole proprietorship owned by D3. The rental for the tenancy was RM150 a month inclusive of water, electricity and local telephone calls. Nowhere in the extremely brief document termed a tenancy agreement is it specified which portion or part of the one and a half storey building is tenanted out to TH Jaya Marketing. The liquidator testified that the top floor of the property was used as an office by TH Jaya Marketing.

[21] The other set of tenants for the same premises were one LGP Marketing Sdn Bhd and one LGP Industries Sdn Bhd, also related to D3. It transpired in the course of D3's evidence that he was the Managing Director of these companies and that he 'crossed-over' to this position soon or around the time of these tenancy agreements. The

A rental rate to the LGP group collectively was RM500 a month inclusive of water, electricity and local telephone calls. A tenancy agreement subsists also dated 1 July 1999, but once again as with TH Jaya Marketing, there is no delineation indicating which part of the building was utilised by this set of tenants.

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[22] In his initial report made when he was appointed provisional liquidator dated 12 September 2001, the liquidator sets out the fact that almost the whole ground floor had been used as a store for products belonging to LGP Marketing Sdn Bhd and LGP Industries Sdn Bhd The liquidator carried out an inspection of the premises when he C officially commenced duty on 30 July 2001 when he met up with D1, the then Managing Director of the plaintiff. He details the fact that when he inspected the premises on that date, he met D1 at the premises and was shown round by him. The stocks stored on the ground floor and pointed out by D1 as belonging to the LGP group were similar in nature D to that of the plaintiff. The liquidator noted that D1 provided him with a list of stock totalling RM20,591.17 which was stored on the inside right hand corner of the ground floor of the premises. In short only a small portion of the ground floor was utilised for storing the plaintiff's stocks, which in any event comprised a relatively small quantity of E goods. He noted in his report that the quantity of stock was quite disparate from the previous year when the stock count was stated to be RM1.17 million in the plaintiff's audited accounts.

[23] The liquidator further testified that D1 had signed the tenancy agreements on behalf of the plaintiff while D3 had signed the tenancy F agreements on behalf of both TH Jaya Marketing as well as LGP Industries Sdn Bhd and LGP Marketing Sdn Bhd. It is material that when the tenancy agreements were entered into, D3 was still a director of the plaintiff. He had not however declared or disclosed in the audited accounts his direct pecuniary interest in the tenanting out of the premises G to these two entities related to him.

[24] The liquidator did in May 2003 appoint an independent valuer, City Valuers & Consultants Sdn Bhd to ascertain the market value of rental of the said property. The professional opinion rendered was that H the market value of the rental for the entire premises was about RM4,500 a month, approximately seven times the original rental levied on the two tenants. At trial, the valuer, Mr Nagalingam Thandavan, PW1 ('PW1') testified in support of his valuation report. He explained the basis on which the report was prepared and how the value was arrived at. He testified that he arrived at a per square foot value for the I property based on the location and then multiplied the number of square feet with the rental rate, thereafter rounding up the figure. This gave rise to the figure of approximately RM4,500 per month. In the course

of cross-examination he was asked whether the sum of RM4,500 would be the rate of rental if all that was rented out was the occasional use of some tables and chairs as well as a passage or access way between the plaintiff's premises and those adjoining it *vide* an access door created in the party to party wall between the two premises.

[25] PW1 accepted that if indeed all that was rented out were some tables and chairs as well as the access way, then the rental would not be that high. There was no serious challenge as to the quantum or basis of his valuation, based on the instructions given to him.

[26] In these circumstances, I accept the findings and opinion expressed by PW1 in relation to the value of current market rental in that area at that time. The issue that arises for consideration in this matter is whether indeed it was the entire premises that were rented by the two tenants or merely the use of some tables and chairs as well as the access or passage way.

[27] D1 in response to the allegations of the liquidator that the premises were tenanted at an undervalue to D3 and his related entities, refutes the same. He maintained in his witness statement that D3 had advised him in early 1999, that he was going to purchase the premises adjoining that of the plaintiff through the LGP group of companies and that he would merely be utilising occasionally some tables and chairs and a room in the plaintiff's premises. This was in addition to the utilisation of the premises by TH Jaya Marketing which had been in existence prior to this date. D1 acquiesced to D3's plan to remove the party to party wall between the plaintiff's premises and that of the LGP group's adjoining premises, so as to enable direct access to those premises. The downstairs lot of the LGP premises, according to D1, was utilised by a tyre company that precluded access for the LGP group. In essence, D1, like D3 as will be seen below, maintained in the course of his evidence that the use of the plaintiff's premises by TH Jaya Marketing and the LGP group was in fact minimal, thereby justifying the low rental imposed.

[28] D3, in response to this allegation of a breach of fiduciary duty, and in like manner as D1, denied the liquidator's allegation of rental at a gross undervalue. He contended that the plaintiff as the landlord, where he was director, and TH Jaya Marketing, where he is the sole proprietor, enjoyed a special relationship whereby TH Jaya provided the supply of leather products to the plaintiff, which it, in turn, procured from overseas suppliers. Accordingly, D3 maintains that it was able to extend to the plaintiff the same favourable credit terms that TH Jaya enjoyed. Given this background of trading, the tenancy agreement had been approved by all directors and shareholders and to that extent was a genuine contract which benefited the plaintiff. He points to the fact

that prior to the execution of the tenancy agreements, no rental at all had been imposed and it was only from July 1999 that a nominal rental was imposed. He pointed out that the liquidator could not possibly be aware of these facts as he was only appointed in 2001.

[29] Additionally he contends that as of 30 September 1999, he had resigned as the Managing Director and as a director of the plaintiff and therefore cannot be held liable.

[30] Further D3 contends that just like TH Jaya, the second category of tenants, namely LGP Marketing and LGP Industries also supplied goods to CTI Leather and similarly afforded favourable credit facilities to the plaintiff. Again he maintains that all the directors and shareholders were aware of this arrangement which is why they agreed to the rentals at those rates. Additionally he contended that all the directors and shareholders were aware of this arrangement and had approved the same. It is however noteworthy that nowhere in the audited accounts produced in this court has D3 disclosed the advantage and benefits he derives, as a director of the plaintiff, from this use of the plaintiff's premises for his own business conducted through TH Jaya Marketing and the LGP group.

[31] He also contends, as does D1 that the second set of tenants, LGP Marketing and LGP Industries were renting premises adjoining that of the plaintiff and only procured access through the plaintiff's premises together with the minimal use of some tables and chairs, thereby explaining the low rate of rental.

[32] Both D3 and D1 further elaborated that while LGP utilised the postal address of No. 5, they did not actually utilise these premises but instead were located next door at No. 3, Jalan 2/108C. D3 maintains that the premises of the ground floor of No. 3 were rented out to a tyre shop resulting in access to the first floor being blocked. Therefore access to the upper floor of No, 3 was procured through the premises of the plaintiff, ie, No. 5 by cutting a space/access through the party wall so as to enable access directly to No. 3 through No. 5. D3 explained that the rental charged was primarily for this access and not for the space in No. 5. Both he and D1 maintain that the plaintiff had full use of the premises in No. 5. Further they maintain that the liquidator is fully aware of this access issue. Accordingly the two directors maintain that the rental levied was fair in all the circumstances of the case as very little space was utilised, largely access. As for TH Jaya, D3 maintains that only an occasional table and chair was utilised whereas the bulk of the space at No. 5 was utilised by the plaintiff.

[33] The primary determinative issue before the court in ascertaining whether or not the tenancies were granted to the tenants at a gross undervalue to the detriment of the plaintiff and to the benefit of D3 and his related entities, is whether the evidence of the liquidator or that of D1 and D3 is to be preferred in relation to the extent of the premises utilised by the two tenants TH Jaya Marketing and the LGP group of companies. This disputed fact determines matters effectively, as if the liquidator's testimony is true, then it would appear that the entirety of the premises were indeed rented out to entities related to D3 at a gross undervalue, given that there is no challenge to the rental assessed by the independent valuer, PW1, at RM4,500 a month. If on the other hand, the premises were indeed utilised almost entirely by the plaintiff and the entities related to D3 merely utilised access to the neighbouring premises and had the use of tables and chairs in the plaintiff's premises, the rental levied by the directors would not appear to be unreasonable.

[34] Before determining this issue however, it is necessary to deal with the parties relative submissions on this point. Learned counsel for the directors, particularly D3, maintain that the directors' contention is borne out by the audited accounts of the plaintiff which disclose that prior to 2001, the plaintiff had stock valued at no less than RM1.17 million which would have required the use of the entire premises, leaving no or little space for the tenants, thereby corroborating the directors' testimony. They also point to the independent evidence that TH Jaya offered favourable credit terms to the plaintiff enabling it to purchase large quantities of stocks while not utilising large banking facilities, thereby again showing that the credit arrangement alluded to by D3 was real and afforded a real advantage to the plaintiff in the course of its business. D1 and D3 rely on their own testimony that the liquidator was aware of the access issue, in these circumstances they maintain that the plaintiff has failed to discharge the onus on it to prove that the premises were rented out to the defendants at an undervalue.

[35] Learned counsel for the plaintiff on the other hand contends that the testimony of D1 and D3 is mere afterthought created for the first time during trial. He relies on the fact that these facts were not pleaded in the defence. Secondly he points to the tenancy agreements executed between the parties and submits that this arrangement pertaining to the use of access and the occasional use of tables and chairs is not reflected there. Finally he submits that the evidence of D1 and D3 is inadmissible because it contravenes the parol evidence rule in s. 92 of the Evidence Act 1950.

[36] I have considered the submissions of all learned counsel. I do not accept that D1 and D3's evidence is inadmissible under s. 92 because it is not immediately apparent that their evidence contradicts the written tenancy agreements. Although the tenancy agreement simply

A states the address of the premises it is so brief that it is unclear whether it is a part of the premises or the entire premises. Even if it were only a part of the premises that was tenanted out, the failure to specify the same does not amount to a contradiction of the tenancy agreement. The agreement does not specify that the entire premises are
B tenanted out either. The position is unclear due to the vague and limited nature of the document. Further and in any event, no objection was taken to the evidence of D1 and D3 on this issue and they were in fact cross-examined to some extent on this issue. Accordingly it is apparent to this court that it is necessary to adjudicate between the competing
C testimonies of the liquidator and the directors.

[37] It is evident from hearing the evidence of the two competing parties, that their evidence is entirely at divergence on this issue. The stark difference in their evidence relates primarily to whether or not the premises at No. 5 were effectively rented out virtually entirely to TH
D Jaya Marketing and LGP Industries Sdn Bhd and LGP Marketing Sdn Bhd or whether it was merely access that was accorded to these tenants and a relatively small space such that the rental paid was commensurate with the utilisation of space and amenities.

E **[38]** A perusal of the tenancy agreement discloses, somewhat less than usefully, that it is the premises, ie, No. 5 without qualification that comprises the demised premises in both tenancy agreements. The extremely brief nature of the agreement does not assist particularly in arriving at a true picture of the precise area of the premises that were
F rented out.

[39] However a relatively objective picture is obtained from the liquidator's first report undertaken as soon as he was appointed a provisional liquidator in July 2001. As I have reproduced at the outset of this topic, the liquidator has set out in some detail the inspection he
G undertook at the demised premises on 30 July 2001 together with D1. He has stated there that D1 pointed out that almost the entirety of the stock found on the ground floor of the premises belonged to the LGP group of companies, not the plaintiff. He also indicated where the plaintiff's stock, worth approximately RM30 thousand had been stored,
H namely on the right hand side on the inside of the ground floor. This representation of events reflects that almost the entirety of the premises, save for the right hand side on the inside of the ground floor, was used by TH Jaya Marketing and LGP Industries and LGP Marketing Sdn Bhd for their stocks and offices.

I **[40]** D1 and D3, on the other hand, have only sought to proffer their explanation as to the limited use of the premises after the initiation of this action. Their explanation that the rental was accorded for the use of some tables and chairs and for the access between the plaintiff's

premises and the adjoining premises owned by the LGP group is well after the event. This arrangement was never made known to the Liquidator. Even if the liquidator did not write to ask them, they were at liberty to point out this fact upon the institution of this suit in 2004 or to allude to the same in some form in their defence. A perusal of their defence however shows that there has been no reference to the 'limited' use of the premises.

[41] In fact, as will be seen below, D1 even signed letters prepared by the liquidator giving notice to these tenants to vacate the premises in 2001, when in fact he had, on behalf of the plaintiff, instructed its solicitors to issue an extension of the subsisting tenancy for a further two years at about the same time. He chose not to disclose the same to the liquidator, but allowed the liquidator to issue the notice to vacate nonetheless. This in itself shows that D1's conduct was less than *bona fide* and that he was prepared to mislead or at the very least, not provide full disclosure to the liquidator.

[42] Next, he was unable to, and did not address the glaring inconsistency between his witness statement and the report accorded by the liquidator dated 12 September 2001. In his witness statement, D1 maintains as I have set out earlier that only access and the use of a few tables and chairs were afforded to the tenants. However, the contemporaneous account detailed by the liquidator stipulates that D1 was the director who showed the liquidator round the premises and explained that the premises were used to house and store stock belonging to TH Jaya Marketing and LGP Industries and LGP Marketing Sdn Bhd In other words, the contents of his witness statement on the issue of the tenancy was completely at variance with the liquidator's contemporaneous account of events made known to him by D1 in July 2001. D1 did not explain this clear inconsistency in the course of his evidence, merely denying that the liquidator's account was true.

[43] Given the contemporaneous nature of the liquidator's account, this court preferred his testimony which I accept to be a true and accurate representation of matters as they stood then. This contemporaneous account was not challenged by any of the directors, notwithstanding that the report was available for inspection.

[44] The fact that D1 allowed the plaintiff's premises to be tenanted at what is clearly an undervalue shows that he failed to protect or safeguard the interests of the company to its detriment. The damage suffered as a consequence is evidenced by the loss in rental the company would have enjoyed if it had been tenanted out at rental rates then prevailing.

[45] Prior to analysing D3's evidence it is necessary to consider whether in fact D3 can be held liable at all given that he resigned as a director of the plaintiff as of 30 September 1999. However the plaintiff maintains that notwithstanding the 'resignation' D3 continued to control matters 'behind the scenes' and that the other directors acted at his behest, particularly D1, who had been appointed Managing Director. This issue therefore requires consideration.

The Relationship Between D1 And D3 And D3's Position As A 'Director' Within The Definition Of Section 4 Of The Companies Act 1965

[46] In the course of D1's evidence it became evident that he acted largely at the behest of D3. It transpired in the course of his and D3's evidence that he had, all along, been an employee working under D3 and had been accorded a shareholding in the plaintiff by D3. He had not paid for these shares as they were given to him by D3. He acknowledged being grateful to D3 for these shares. D1 had in fact been employed as a salesman with the plaintiff in 1992. Some seven years later he became a director of the plaintiff and within six months thereafter became the Managing Director. He was appointed Managing Director to replace D3 who resigned as a director. These events occurred in September 1999.

[47] D3 then went on to join LGP Industries and Marketing Sdn Bhd as the Managing Director while also remaining the sole proprietor of TH Jaya Marketing. As stated at the outset, D3 remained a cheque signatory of the plaintiff.

[48] Turning back to D1, it was clear from the evidence that he was appointed Managing Director at the behest of D3. It also became evident from his evidence that even after he was appointed Managing Director he was not the real decision maker of the plaintiff. This is because he was unable to explain several matters.

[49] For a start he was unable to explain why he had not queried the fact that D3 was executing the tenancy agreements for the tenants, TH Jaya Marketing and the LGP group, when he was still a director of the plaintiff.

[50] Further D1 failed to confront D3 on the clear conflicts of interest that arose in respect of the tenancy, as well as trading transactions with TH Jaya Marketing which resulted in enormous gains for D3 through this entity, often to the detriment of the plaintiff. D1 was unable to explain why he failed to do so, notwithstanding that he was the Managing Director of the plaintiff with the responsibility of ensuring that the plaintiff's interests and security was safeguarded.

[51] In fact in the course of D1's evidence it became clear that he was not well-versed in the English language and required the services of a translator to give evidence in court. This is completely at odds with his witness statement which is drafted in sophisticated English and which suggests that he was an independent Managing Director who was well versed with the affairs of the plaintiff and had the interests of the plaintiff at the forefront of his mind. His witness statement gave a highly detailed and relatively complex account of matters in some specificity and detail without even a jurat indicating that he understood the contents of the same. In dire contrast, in the course of cross-examination, it became apparent that he had no such detailed knowledge. Every time he was confronted with a difficult question relating to the accounts of the plaintiff or the affairs of the plaintiff while he was the Managing Director, he simply answered 'I don't know' or 'I don't remember'. His demeanour was simplistic, and could be likened to that of one who had no real knowledge or control of the plaintiff.

[52] This brings to the fore an important point to be considered by counsel during trial. With the use of witness statements, there is an overwhelming tendency for solicitors to put in writing their comprehension of the facts in legal language in the witness statement, without ascertaining that this amounts to the witness's testimony or that the witness himself comprehends the statement in full. When cross-examined on what is, in effect the solicitor's language, the witness is astounded and unable to answer, often not even comprehending the content of what is, after all, his testimony in evidence in chief. This has a deleterious effect on his credibility. Counsel are therefore cautioned to ensure that witness statements are prepared so as to reflect the testimony of the witness and not that of the legal position his solicitors are adopting. The purpose of witness statements is to save the time taken in recording the witness's evidence. It is an abuse of the system to put in the witness's mouth language not reflecting his testimony.

[53] Reverting to D1 and his testimony, he was unable to tell the court when he had instructed the plaintiff's solicitors to extend the tenancies, notwithstanding that he was the one to do so. He even had difficulty recalling the name of the solicitor he had instructed. When queried why he had chosen not to disclose the fact of these extensions to the liquidator, he simply said the liquidator had not asked him and so he had not volunteered the information. This failed to explain why he had signed letters prepared by the liquidator purporting to avoid the tenancies when he himself had instructed their extension previously. Such inconsistent conduct suggests that D1 did not comprehend what he was doing, or that he chose to be entirely obstructive to the liquidator to the extent of misleading him.

[54] He was also questioned about the length of time it took him to surrender all the salient documents of the plaintiff to the liquidator so as to enable the liquidator to arrive at a comprehensive picture of the business and trading of the plaintiff as a whole. D1 maintained that he had done so when the liquidator took office. However it is evident from the records of the plaintiff that the liquidator wrote several letters to D1, seeking the accounts and other records of the plaintiff. At a contributories' meeting held soon after the liquidator was appointed, the minutes disclose that D1 together with D3 and their solicitor, Mr Eg, DW3, of M/s Rajah & Lau were less than helpful and more than hostile when it came to giving the liquidator any assistance. The minutes reveal that Mr Eg, acting on behalf of the directors, D1 and D3 refused to afford the liquidator copies of documents pertaining to a suit initiated by the plaintiff, instead instructing the liquidator to make copies of such documents from the court as they were public documents. The entire tenor of the contributories meeting evidences the fact that these contributories were intent on precluding the liquidator from chairing the meeting notwithstanding that he was entitled to do so. It is evident from these minutes as well as minutes of other creditors' meetings that no assistance or information was divulged to the liquidator to enable him to carry out his duties smoothly. D1 and D3 were clearly hostile. This can be attributed in part to their notion that the liquidator was 'biased' having been appointed at the behest of two other shareholders, Mr Ng Yoke Gee and Mr Foong Seong Thye with whom D3 was at loggerheads.

[55] Having heard the evidence in full at trial, I find no basis for such a conclusion. There is no evidence of the liquidator having been biased in his undertaking of his duties. In any event, as was pointed out to Mr Eg, as an advocate and solicitor of the High Court of Malaya, he and his clients as one time and current directors of the plaintiff owed a duty of disclosure and full co-operation to the liquidator. That duty was not fulfilled, necessitating the bringing of this action.

[56] In summary, D1's evidence was less than tenable and credible. His testimony disclosed that he remained in the plaintiff and carried out its operations at the behest of D3. D3 remained a *de facto* director of the plaintiff notwithstanding his 'resignation' in September 1999, as borne out primarily by the fact that he remained a cheque signatory until a provisional liquidator was appointed in 2001.

[57] D1 was, and I so find, a director who acted entirely at the behest of D3, not being able to function independently or to carry out the functions of Managing Director so as to safeguard the interests of the plaintiff. This is borne out for example by the reduction in stock from 1.7 million to approximately RM30,00 within the course of one

year. A large quantum of the proceeds of sale of such stock in the sum of no less than RM620,000 appear to have been paid out to TH Jaya Marketing. D1 however was unable to explain the same, effectively hedging his answers in the course of cross-examination.

[58] Finally there is also a cheque dated October 2000 signed by D3 to the Inland Revenue which bears out the fact that he remained in control of the finances of the plaintiff until liquidation. D1 and D3 chose to explain away this fact by stating that D3 had 'pre-signed' the cheque before resigning. I am unable to accept this somewhat crude attempt to explain away what is clearly the truth, namely that D3 remained in control of the plaintiff as *de facto* director until the company was wound up.

[59] In summary therefore having considered the testimony of the liquidator, D1 and D3, I am satisfied that D1 executed his functions as Managing Director at the direction and behest of D3. This is borne out by his general lack of knowledge of the affairs of the plaintiff, its operations and his deferential attitude to D3. The speed at which he became Managing Director and the circumstances whereby he replaced D3 conveniently all go towards establishing this fact.

[60] Moving on to D3, he benefited directly from the rental of premises for his other businesses at a low rental, to the detriment of the plaintiff. The fact that he resigned as a director in September 1999 does not detract from the fact that he was the managing director and a director when the plaintiff first entered into the tenancy agreements. The conflict in interest arose at that juncture as did the breach of fiduciary duty. D3 benefited directly from having the premises tenanted to his related companies at an undervalue. Moreover as I have detailed above, I find that he remained as *de facto* director notwithstanding his 'resignation'. The fact that he remained a cheque signatory until the provisional liquidator was appointed also goes to show that he remained in control of the financial affairs of the plaintiff until then.

[61] As a witness, I found D3 to be astoundingly glib and flippant in his evidence, brushing off clear conflicts of interest between his functioning as a director of the plaintiff as well as owner of TH Jaya Marketing and Managing Director of the LGP group, as the way in which 'Chinamen' do their business. The clear delineation between the plaintiff as a distinct corporate entity with its own interests which are completely separate from that of TH Jaya Marketing and LGP Industries Sdn Bhd and LGP Marketing Sdn Bhd appears to have completely eluded him. It transpired from his evidence that the plaintiff was one of the many companies started up by him with other colleagues from his previous employment. As a consequence of a disagreement between

himself and other shareholders, the plaintiff was wound up at the behest of Mr Ng and Mr Fong who nominated the liquidator to take conduct of the affairs of the plaintiff. In view of this nomination, D3 viewed the liquidator as being 'biased'. I have already stated that 1 found no evidence of bias on the part of the liquidator. If anything, the liquidator was meticulous in wanting to comply with his statutory duties. D3 together with the other director D1, failed to co-operate with the liquidator, to the extent of refusing to divulge relevant information to him. When queried on their obstructive attitude by the court, D3's response was that the liquidator had adopted a very hostile attitude towards them from the outset leading to the complete breakdown in communication between the parties. While there may well be some basis for D3 and D1 to have this impression, this does not derogate from their duties to provide full co-operation to the liquidator, and more significantly to fulfil their fiduciary duties owed to the plaintiff.

The Tenancies

[62] Reverting to the issue of the tenancies, it is beyond doubt that D3 benefitted directly from the tenancy of the plaintiff's premises to his two entities at a gross undervalue, given that I have accepted the liquidator's version that it was the entirety of the premises that was utilised by the tenants, not merely the access door/partition together with a few tables and chairs.

[63] As such it can be said that he knowingly allowed the plaintiff's premises to be tenanted out at an undervalue, as a consequence of which he derived a direct benefit.

[64] Coupled with the foregoing is the finding of this court that D3 remained *de facto* director of the plaintiff within the context of s. 4(1) of the Companies Act 1965 notwithstanding that he 'resigned' as of September 1999. His continued control of the plaintiff is borne out, *inter alia*, by:

(i) D3 remaining a cheque signatory thereby having control of the finances of the plaintiff notwithstanding his resignation. In this context it is relevant that he remained a sole signatory capable of signing cheques on behalf of the plaintiff until liquidation;

(ii) The cheque made out to the Inland Revenue in October 2000, well after he had resigned as director for a sizeable sum. I do not accept the evidence of D1 and D3 that this cheque was 'pre-signed'. It appears to this court that the explanation of 'pre-signing' the cheque is a convenient excuse to seek to disassociate himself with the plaintiff;

(iii) The entirety of the evidence of D3 and D1. When D3's evidence is considered in conjunction with D1's, the relative roles played by these directors becomes patently clear. Taking into account D1's relative lack of knowledge and decision making abilities, coupled with D3's continued role in the plaintiff notwithstanding his 'resignation' and the continued benefits he derived from the plaintiff for his three entities, all go towards establishing that he remained in control of the plaintiff and acted in breach of his fiduciary duties to the plaintiff as his acts were calculated to bring detriment to the plaintiff and benefit to TH Jaya Marketing and the LGP Group. There was an effective siphoning out of assets from the plaintiff to these entities. This was all premised on the shareholders' dispute between himself, Mr Ng Yoke Gee and Mr Foong Seng Leong.

[65] As such the fact that D3 seemingly 'resigned' as a director in September 1999, does not absolve him of a breach of fiduciary duty in relation to the rental of the tenancies at a gross undervalue. As concluded above, having considered D1 and D3's evidence in full, I am satisfied that D3 remained a 'director' within the definition accorded to the word in s. 4(1) of the Companies Act 1965. I find that he, like D1 is in breach of his fiduciary duties and is liable to the plaintiff for the losses suffered as a consequence of the rental of the plaintiff's premises at an undervalue.

Attempts By The Liquidator To Avoid The Tenancies And 'Estoppel'?

[66] The other salient facts relating to the tenancy were further explained by the liquidator. He stated that after he was appointed, he did on 30 July 2001 prepare a letter to the tenants stating that he would be taking vacant possession of the property on 1 July 2002. The tenancy agreements were due to expire on 30 June 2002. In other words he gave the tenants almost one year's notice of his intention to recover possession of the properties upon expiry of the tenancy. These letters were signed by D1 who made no mention of the fact that he had in fact instructed the extension of these tenancy agreements on 24 January 2000.

[67] Subsequently on 22 April 2002, solicitors for the LGP Marketing and LGP Industries Sdn Bhd wrote to the liquidator advising that the plaintiff had in fact extended the tenancy agreements by two years from their expiry date on 30 June 2002 and that the rental had been increased by 20% for the extended period.

[68] On 9 May 2002 the liquidator also received two letters from another set of solicitors, this time for TH Jaya Marketing which disclosed that an extension of the tenancy agreement had been granted

to TH Jaya Marketing in like vein for a further two years from its expiry on 30 June 2002 with an increase in rental of 20%. Upon inquiry as to who from the plaintiff had authorised this extension, the liquidator discovered that D1 was the director who had instructed the extension.

[69] The liquidator then instructed the plaintiff's solicitors to write to the tenants' solicitors asking that they leave the premises on or before 30 June 2002. However the tenants refused to do so whereupon the liquidator filed an application in the winding-up matter to apply for leave to enable him to avoid the tenancy agreements. Upon the advice of his solicitors however, he withdrew the said application, with the net result that it was never heard nor adjudicated upon. Eventually upon the expiry of the extension to the tenancy agreements, the tenants handed back vacant possession of the property to the liquidator on or around 30 June 2004.

[70] In the course of cross-examination it was put to the liquidator that his withdrawal of the application to avoid the tenancies coupled with letters to the tenants seeking to collect rental at an increased rate, amounted to a ratification of the tenancy agreements, thereby precluding him from claiming loss of rental from the directors on the premise that the tenancies were entered into at an 'undervalue'.

[71] It is further submitted that the principles of *res judicata* are also applicable in that the liquidator is precluded from raising issues that were raised in the application filed to avoid the tenancies and which was subsequently withdrawn.

[72] The application made by the liquidator to avoid the tenancies was filed under the winding-up petition. The opposing parties to the application were the tenants under the tenancies, namely TH Jaya Marketing and the LGP Group, not the directors of the plaintiff. The net effect of the application, if it had been heard in full, would have been either an order allowing or disallowing the avoidance of the tenancies which would have directly impacted the tenants, not the directors of the plaintiff, namely D1 and D3 (as *de facto* director).

[73] More pertinently, the application was never heard and adjudicated upon as it was withdrawn. In other words it was not heard on its merits. The liquidator explained in the course of his testimony that after filing the application to avoid the tenancies, he was advised by his legal advisors to withdraw the complaint as the tenancies would expire shortly. It was put to him that the tenancies would not expire shortly but after some length of time, to which he disagreed. In these circumstances can it be said that *res judicata* and issue estoppel arise, precluding the liquidator from pursuing his claim of damages against the directors for a breach of fiduciary duty?

[74] In Bennion on *Statutory Interpretation* (5th edition) the learned author examines the doctrine of estoppel: A

> ... The doctrine known as estoppel per *rem judicatam* (*res judicata*) in part arises from the doctrine interest *reipublicae ut sit finis litium*, as does the avoidance of double jeopardy. Both also arise in part from the maxim *nemo debet bis vexari pro una et eadem causa*. Estoppel per *rem judicatum* includes two species, namely cause of action estoppel and issue estoppel. In a wider sense it makes it an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. B
>
> Cause of action estoppel inhibits a second action where the judgment in the first was a final judgment and there is identity of parties and subject matter. It applies to any judicial determination, even by a tribunal ... C
>
> Issue estoppel is based in part on the maxim *bona fides non patitur, ut bis idem exigatur* (good faith does not suffer the same thing to be exacted twice). It applies where a particular issue, such as a question on the legal meaning of an enactment, has been litigated to finality in one set of proceedings and is raised again in later proceedings between the same parties or persons claiming under them ... D

[75] Applying the foregoing to the facts of this case it is evident that cause of action estoppel does not arise as the application filed by the liquidator was not adjudicated upon such that there was no final judgment handed down. As for issue estoppel, similarly it cannot be said that the issue of whether the directors in the instant case have acted in breach of their fiduciary duties in renting out the plaintiff's premises to known or related third parties at a gross undervalue, has been previously litigated or adjudicated upon. There has been no litigation to 'finality' precluding the liquidator from pursuing his claim. More importantly the parties to these matters and the substance also differ as pointed out earlier. In these circumstances the numerous cases cited by learned counsel for D3 in relation to estoppel and *res judicata* are inapplicable. E F G

[76] What about ratification? Can it be said that because of the withdrawal and the acceptance of rental at a slightly increased rate, which was still well under the market rate, the liquidator had 'ratified' the tenancies? To my mind it cannot be said that a breach of fiduciary duty can be so ratified, moreover by the liquidator. The fact that the liquidator chose to pursue the monies due to the plaintiff by instituting an action against the directors, and in the interim ensured that all rentals were collected, does not amount to a ratification of the tenancies. The liquidator was ensuring that all monies due to the company were duly collected. The loss suffered by the plaintiff as a consequence of rental of its premises at an undervalue was not 'waived' by the liquidator as a consequence. H I

[77] He instead sought to recover the same through these proceedings and I hold that he is not precluded from so doing.

[78] One other issue that requires mention is the fact raised by learned counsel for D3 that the liquidator only came into the picture in 2001 and that he could not have known the true utilisation of the premises prior to that date. In these circumstances, it is maintained that D1 and D3's evidence is to be accepted. When coupled with the fact that the audited accounts show a considerable quantity of stock, it is submitted that the liquidator's assumptions ought not to be accepted, and the evidence of D1 and D3 preferred. I have considered this point and concluded that in view of the lack of reliability of D1 and D3's evidence, I am unable to accept their testimony. The fact that neither D1 nor D3 even when the liquidator was appointed sought to make known this fact to him, and in fact told him otherwise when a tour of the premises was conducted leads me to conclude that the version of events made known to the liquidator in July 2001 represented the true state of affairs even prior to that date. Accordingly it appears that the premises were tenanted as a whole to TH Jaya Marketing and the LGP group and they had use of the premises during the entirety of the tenancy agreements.

[79] A final issue for consideration in this matter is that in its claim the plaintiff sought to recover a sum of 174,240 being the loss of rental suffered. In the liquidator's evidence however the sum claimed is RM181,680, a greater sum. It is not open to the plaintiff to increase the sum claimed in this manner. Therefore the plaintiff is entitled to the sum claimed in the statement of claim of RM174,240 being the losses suffered by the plaintiff as a consequence of the breach of fiduciary duty of D1 and D3. They are jointly and severally liable for the same. No order is made against D4 in this context as no such order was sought by the plaintiff.

Issue (ii): Whether D1 And D3 Acted In Breach Of Their Fiduciary Duties In Disposing Of Substantive Quantities Of A Stock Known As 'Dream Tex' Procured From Th Jaya, Which Is Related To D3, And Sold The Same At A Gross Undervalue To A Third Party, Causing The Plaintiff To Suffer Substantive Loss

[80] The liquidator testified in relation to this complaint that when he went through the limited documents of the plaintiff in his possession he found a stock card for a stock known as "Dream Tex" which disclosed that the plaintiff had acquired stock valued at RM454,500 on 25 November 1999 from TH Jaya Marketing, where D3 is the sole proprietor. The stock card has been produced in evidence. The liquidator further contends that D1 and D3 caused the plaintiff to purchase 1515 metres of this stock from TH Jaya at RM300 per metre, then sold

15 metres of this stock to an unidentified third party for cash at RM350 per metre. They then disposed of the balance stock comprising 1500 metres of Dream Tex to an entity known simply as SKHC for RM9 per metre. The liquidator's complaint is that he is unable to ascertain the identity of 'SKHC' and that the stock was sold at a gross undervalue. This it is contended caused loss to the plaintiff, given the value of the stock at acquisition. The acts of D1 and D3 in so disposing of this stock amounts, it is alleged, to a breach of fiduciary duty.

Was Th Jaya Marketing Paid For The Dream Tex Stock In The Sum Of RM454,000 By The Plaintiff?

[81] Prior to considering the evidence of D1 and D3 in response to this allegation a matter that arises for consideration is this. D1 and D3 maintain that TH Jaya Marketing was not paid for the Dream Tex stock because the stock was defective. They both maintain that although the stock is valued at RM454,000 there is no evidence of any such payment by the plaintiff to TH Jaya Marketing. As such they contend that this allegation is flawed, as if the plaintiff indeed did not pay TH Jaya Marketing the sum of RM454,000 then it has suffered no loss whatsoever but instead has made a gain in selling the deteriorated or defective stock to SKHC at even RM9 per metre.

[82] However the plaintiff contends that in previous proceedings, namely High Court Companies (Winding-Up) No. D5-28-57-2000, a finding was made in those High Court proceedings that the plaintiff had paid TH Jaya Marketing for the Dream Tex stocks and had in fact overpaid TH Jaya by a considerable sum. The background to this case is as follows:

(i) D3, in his capacity as the sole proprietor of TH Jaya Marketing appealed to the High Court in the winding-up proceedings against the decision of the liquidator rejecting a proof of debt form submitted by TH Jaya Marketing seeking to prove that the plaintiff was indebted to TH Jaya Marketing in the sum of RM515,229.39 as of 20 November 2001;

(ii) TH Jaya Marketing had filed a Proof of Debt Form together with details and proof in or around 15 January 2002 ('the first Proof of Debt Form'). The liquidator had disputed the claim *vide* several replies and finally on 11 October 2002 had rejected the claim altogether. The liquidator maintained that that the plaintiff had already made the payment claimed of RM515,229 and had in fact overpaid the said sum. Accordingly an appeal was filed by TH Jaya Marketing through its sole proprietor, D3.

(iii) The appeal was heard and adjudicated upon by Ramly Ali J. (now CJA). In para. 8 of His Lordship's judgment he specifies that the invoices claimed by the applicant, ie, D3 as sole proprietor of TH Jaya Marketing, included claims for the sale of both 'prayer mats' and the 'Dream Tex' stock by the plaintiff from TH Jaya Marketing. His Lordship recognised that this was the primary issue in the current action and made mention of the same;

(iv) In his judgment, His Lordship specified that the first Proof of Debt Form filed by TH Jaya Marketing was for the sum of RM515,229.30 which was supported by 9 invoices and 2 debit notes for the period spanning 1 November 1999 until 28 January 2000. It was maintained that payment had been made for the period from 30 January 2000 until 30 November 2000 in the sum of RM620,000. All of this payment was supported by valid documents. The judgment goes on to specify that the foregoing meant that TH Jaya's entire claim had been paid in full. In fact there was an overpayment and the court concluded that it was prudent of the liquidator to have rejected the first Proof of Debt filed by TH Jaya Marketing;

(v) His Lordship next considered the 2nd Proof of Debt Form filed. His Lordship specified that this second proof of debt form comprised the same details and series of invoices save that seven additional invoices had been added. The judgment states that the addition of these details raises several queries including the reason why these details were not specified in the first Proof of Debt form. The second proof of debt form claims a sum of RM453,661.06 as compared to RM515,229.39 in the first proof of debt form, without any explanation for the difference.

(vi) His Lordship then stipulates in the judgment at para. 15 that while going through the second proof of debt form, the liquidator found records that an invoice number 2224 for 'Dream Tex' stocks was taken out on 25 November 1999 and the said invoice was not entered into the list in the second proof of debt form. Logically therefore His Lordship concluded that that particular invoice must have been settled in full. If it had not been paid in full, the invoice would definitely have been included in the second invoice. In this portion of the judgment therefore His Lordship makes a finding that the 'Dream Tex' stock was paid for in full by the plaintiff. The judgment goes on to consider the totality of the payments made by the plaintiff, concluding that there was an overpayment to TH Jaya Marketing and upholding the decision of the liquidator to reject the several Proofs of Debt filed by the latter.

[83] The issue before this court is whether or not D1, D3 and D4 acted in breach of their fiduciary duties in disposing of the Dream Tex stock at a gross undervalue when it was purchased for a value of RM454,000. One of the issues that needs to be considered in adjudicating on this issue is the loss, if any, suffered by the plaintiff. D1, D3 and D4 all contend in these proceedings that as the Dream Tex stock was never paid for by the plaintiff, primarily in view of the defective nature of those stocks, no loss was suffered by the plaintiff in disposing of those stocks to 'SKHC' at RM 9 per metre. There was, they maintain, a gain instead.

[84] Is it open to D1, D3 and D4 to contend in this court that the 'Dream Tex' stocks have not been paid for in view of the judgment above? Learned counsel for D3, whose submissions are adopted by the other two directors, maintains that this court may proceed to consider this issue afresh on the grounds that the matters to be adjudicated upon in this civil suit are different from those in the rejection of TH Jaya's proof of debt, as the issue here is whether the directors committed a breach of their directors' duties in purchasing the Dream Tex stock and selling the same to SKHC. Additionally it is submitted that the learned judge was mindful of the issues to be determined at this trial and 'must have intended not to make any finding that would be binding on the court hearing the suit.'

[85] Thirdly it is contended that the rejection of a proof of debt is not in the nature of a final judgment at a full trial and the court in hearing the appeal was undertaking a task similar to that of judicial review. Accordingly it is submitted that *res judicata* does not apply where the earlier proceedings were not a final judgment after a full trial, (see *Ali Tan Sri Abdul Kadir & Ors v. Simpang Empat Plantation Sdn Bhd* [2008] 5 CLJ 305 and *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805). The plaintiff on the other hand, contends that the finding of the High Court is binding.

[86] I have considered the submissions of all parties. I adopt the earlier definitions I have set out in relation to *res judicata* and issue estoppel. It is apparent from a reading of the judgment of Ramly Ali J (now CJA) which I have referred to at some length above, that a clear finding of fact was made by the learned judge in the course of adjudicating on the decision of the liquidator in rejecting the proof of debts filed by TH Jaya Marketing. As indicated above, a finding was made on the evidence presented to the court that the Dream Tex stocks have been paid for.

[87] They comprise a part of the sum of RM515,229.39. In these circumstances the issue of whether or not the Dream Tex stocks were paid for by the plaintiff does not and cannot arise for adjudication again

in these proceedings. To allow this same issue to be relitigated would amount to an abuse of the process of this court. Jeopardy would arise as there could possibly be two possible, findings on this one issue, namely whether or not the Dream Tex stock has been paid for. The fact that the rejection of a proof of debt comprises a different type of proceeding which requires the court to adopt an approach akin to that in judicial review cannot detract from the fact that essentially the same issue is sought to be relitigated in these proceedings. This is particularly so when the Court of Appeal has confirmed the decision of the High Court. It is clear to my mind that estoppel and *res judicata* arise in relation to this issue, namely whether or not the Dream Tex stocks were paid for by the plaintiff. *Res judicata* and issue estoppel certainly do not arise in relation to the fundamental issue of whether or not the directors were in breach of their fiduciary duties, as that issue was not litigated in the earlier proceedings. Therefore it is open to the directors to explain why they disposed of the stock at a gross undervalue, but it is not open to them to argue that they did not pay for the stock in the first place and that therefore no loss arose *vis a vis* the plaintiff.

[88] The directors have also said that the plaintiff did not pay for the Dream Tex stock because TH Jaya itself did not pay the manufacturer or distributor in Korea for this stock. If indeed such is the case, and the plaintiff did not pay TH Jaya Marketing for the stock for this reason, then why did TH Jaya Marketing seek to recover this debt from the plaintiff in the first place by annexing it to the proof of debt before subsequently removing it? It should not have comprised the subject matter of an entry in the proof of debt at all. In all these circumstances, it is apparent that the stance taken by the directors in relation to the payment for the Dream Tex stock is conflicting and less than credible. I find that by reason of issue estoppels this court is precluded from making any finding on the issue of whether or not the Dream Tex stock was paid for by the plaintiff. Such a finding has already been made in the proceedings before Ramly Ali J. and I respectfully adopt His Lordship's finding there in relation to this issue.

Did The Directors Have A Legitimate Reason For Disposing Of The Stock To SKHC At A Greatly Reduced Price?

[89] In response to the allegation that the Dream Tex stock was sold at a gross undervalue to one 'SKHC', the directors maintain that they had to do so because the stock had deteriorated to such an extent that it could not be used, in support of this contention, D3 produced on the eve of the date for trial, documents purporting to substantiate their position that the stocks had indeed deteriorated.

[90] I have considered D1's evidence on this issue. In summary, D1 answers this complaint by explaining that the stocks were sold at a low price because they had deteriorated badly. Secondly, he points to the fact that the stock was not paid for by the plaintiff thereby precluding the allegation of loss suffered by it. However this latter point is not available for consideration for the reasons I have outlined above in relation to the earlier High Court decision.

[91] D3 maintains in response that he had already left the plaintiff by the time of acquisition of this stock from his sole proprietorship. He explained that the plaintiff received the order for this stock from one of its customers, Menang Nusantara, and asked TH Jaya Marketing in turn to order the stock from a Korean manufacturer. According to D3, the customer, Menang Nusantara refused to accept the stocks whereupon a winding-up petition was filed against it. As a consequence the plaintiff was constrained to store the Dream Tex stocks while trying to source a new customer to mitigate its loss. In the meantime the stock became 'oily' and deteriorated. According to D3 this was due to the poor storage conditions in the plaintiff. The complaint of the plaintiff about the rapid deterioration of the stock was sent to the manufacturer who denied liability and maintained that the defect was caused by poor storage conditions. D3 also confirms that TH Jaya Marketing was not paid and that it had not made claim against the plaintiff for payment for these stocks.

[92] The plaintiff objected to the evidence produced by D3 on the eve of trial seeking to substantiate the issue of deterioration, contending that it amounted to a material fact which had not been pleaded. Additionally they pointed to the fact that this evidence was being produced very late in the day as an afterthought. During trial I allowed the evidence to be led, stating in response to the plaintiff's objections, that I would consider the *bona fides* of this defence in the course of my judgment.

[93] I have had occasion to consider the evidence of the various parties as well as the documentary evidence. It is indeed true that this very material particular pertaining to the 'deterioration' of the Dream Tex stock has not been mentioned at all in the pleadings. The report to substantiate the directors' testimony only became available a few days prior to trial, notwithstanding that all documents were ordered to be filed months prior to trial. The Dream Tex stock comprises a large and expensive item in the plaintiff's stock list. This is because it was purchased at a cost of RM454,000. Notwithstanding the fact that it ought to have been one of the more important items in the plaintiff's stock list, there is no mention in any of the records of this material having deteriorated extraordinarily quickly as a consequence of poor storage, as is now alleged by D3 and the other directors.

[94] There is no mention of the defects in the stock in the plaintiff's audited accounts for the year ended 1999, notwithstanding that this stock involved a significant portion of the plaintiff's stock value stated to be RM1,117,428 in the accounts for that year. This is although the audited accounts were filed in July 2000 and the alleged defect discovered in May 2000. More significantly, at no time did the directors raise this issue with the liquidator, although they were busy making claim for the recovery of these monies from the plaintiff.

[95] The very late introduction of the report detailing the alleged defects in the stock coupled with the lack of identity of SKHC, which remains a mystery to this day, and the complete lack of disclosure of these alleged defects in the audited accounts and to the liquidator, throws grave doubt on the veracity of the directors' contention that these stocks were in fact defective, necessitating disposal at a gross undervalue. This excuse appears to be very much an afterthought crafted specifically to meet the valid queries of the liquidator. In these circumstances I am unable to accept the directors' contention that the stocks were 'oily' and had deteriorated, warranting disposal at a gross undervalue. I accordingly reject the same.

[96] Having considered the entirety of the evidence on this issue, it appears to this court that D1 and D3 have provided not provided a plausible explanation for the Dream Tex stock, which was sold to an unknown third party at a gross undervalue. This stock comprised a significant part of the plaintiff's entire stock. As such, by failing to safeguard a significant portion of the plaintiff's stock and allowing it be sold at an undervalue, it seems to this court that the directors have failed to safeguard the assets of the plaintiff adequately or at all. This amounts to a breach of fiduciary duty and I hold that D1 and D3 are responsible for the losses incurred by the plaintiff as a consequence of the sale of the Dream Tex stock at a gross undervalue, amounting to RM435,750.

[97] With respect to D4, I had some difficulty in adjudicating on the part he played in these matters. It was clear from his evidence that he played no active part at all in the operations of the plaintiff on a day to day basis. He had no knowledge of the Dream Tex stocks or the alleged defects or otherwise in relation to these stocks. He had no knowledge of the 'sale' of these stocks at an undervalue. On the other hand as a director it can also be said that he could not absolve himself of all liability for the loss of the assets of the plaintiff by simply claiming ignorance or a lack of knowledge. I believe his evidence that he did not play any active part in the operations of the company. I weighed these competing matters, and finally decided that as D4 was, as a matter of

fact, unaware and uninvolved in the entirety of the matter pertaining to the Dream Tex stocks, he ought not to be held to be in breach of his fiduciary duties. He is therefore not liable for the losses thus incurred by the plaintiff.

Issue (iii): Did D1, D3 And D4 Act In Breach Of Their Fiduciary Duties In Disposing Of Stock Comprising 10,020 Pieces Of Prayer Mats Purchased From Th Jaya Marketing At A Cost Of RM631,260 But Failing To Account For This Stock In Terms Of Sale Or Otherwise, Thereby Causing Substantive Loss To The Plaintiff?

[98] The liquidator complains that in or around October 1999, D1, D3 and D4 caused the plaintiff to purchase 10,020 pieces of prayer mats from TH Jaya Marketing at RM63 per piece at a total cost of RM631,260. There are invoices from TH Jaya Marketing bearing out this fact. According to the liquidator, D1 acknowledged receipt of these stocks on behalf of the plaintiff on delivery notes. He also points to the fact that the plaintiff paid TH Jaya Marketing in full for these prayer mats. However his complaint is that there is no official record showing that the plaintiff sold these prayer mats to any party. As a consequence, the liquidator maintains that the plaintiff has suffered a loss of RM631,260 which he contends is attributable as a breach of fiduciary duty to the defendants.

[99] D1 refutes the allegation of a breach of fiduciary duty strongly. He explains that the goods were indeed purchased from TH Jaya Marketing and sold and delivered to the plaintiff's end-customer, one AL Auto Supplies Sdn Bhd ('AL Auto'). AL Auto had paid a cash deposit of RM30,000 but subsequently failed to pay the remained of the sum due and owing to the plaintiff. As such, D1 instructed the plaintiff's then lawyers, M/s Rajah Lau & Assocs to recover the monies due to the plaintiff, by, *inter alia*, issuing a s. 218 notice under the Companies Act 1965. This was duly done and when AL Auto failed to respond, D1 instructed his lawyers to petition for the company to be wound up. AL Auto was subsequently wound up on 11 August 2000 in the Kuala Lumpur High Court. D1 produced evidence of this fact. As such he maintains that he took all reasonable steps to recover the debt *bona fide* incurred in the course of trading and denies strongly the allegation of a breach of fiduciary duty. The loss suffered by the plaintiff arose as a consequence of AL Auto's refusal or failure to pay, rather than any breach of fiduciary duty by himself or the other directors.

[100] In support of the contention that there was a valid and real sale to AL Auto Sdn Bhd followed by attempts to recover the debt, D1 produced all the cause papers relating to the winding-up of AL Auto

Sdn Bhd. The entity has a registered address, and there is a letter from a director of this entity to D1 advising that they would be shifting their operations and address and would advise the plaintiff accordingly. The company, AL Auto Sdn Bhd has been wound up.

[101] D3 also points to the validity of the transaction with AL Auto as explaining the matter fully. He also denies acting in breach of fiduciary duty as the directors cannot be blamed for a transaction which amounts to a bad debt.

[102] As for D4 he maintains that as a non-executive director he has no knowledge about this transaction involving TH Jaya Marketing, the plaintiff and ultimately AL Auto Sdn Bhd.

[103] The plaintiff on the other hand, maintains that the entire transaction is a sham. The liquidator points to the fact that the address for AL Auto is a post box address and the fact that the directors never put forward this explanation prior to the institution of this suit to explain the 'disappearance' of the prayer mats. Again he contends that the sale transaction to AL Auto Sdn Bhd as well as the winding-up proceedings are a sham.

[104] Having heard the various witnesses and having considered their testimonies in full, I am unable to accept that D1, D3 and D4 acted in breach of their fiduciary duties in failing to account for the 10,020 prayer mats. This is because I accept the directors' version of events. They have put forward a reasonable and plausible explanation for the stock, namely that it was sold and delivered to AL Auto but that the entity has not paid for the same. There is on the other hand, insufficient evidence to prove that this transaction is a sham. The veracity of the documents relating to the winding-up of AL Auto is not in doubt. In this context the veracity of D1's evidence is supported by the evidence of the solicitor instructed by him, PW4, Mr Eg, who gave evidence of the fact that he was instructed to wind-up AL Auto for failure to repay the debt owed to the plaintiff. I accept the evidence of these two witnesses. Having done so, the inexorable conclusion to be drawn is that there is no basis for the liquidator's allegation of a breach of fiduciary duty on the part of these directors. The elements to support the allegation of a breach of fiduciary duty are missing in the instant case. Similarly with regards to D3, if the transaction with AL Auto was not a sham, it follows that he could not, in this instance, have acted in breach of his fiduciary duties, given that I have previously found that he remained a *de facto* director of the plaintiff within the context of s. 4 of the Companies Act 1965.

[105] With regards to D4, I also accept that he; was a non-executive director who had no knowledge of the details of this transaction. Again in view of my acceptance of D1's evidence on this issue, it follows that the allegation of a breach of fiduciary duty against him must also fail.

Conclusion

[106] Having heard the evidence of the parties in full, I am satisfied that the liquidator has succeeded in his case against the directors in respect of two of the three allegations, namely in relation to the tenancies in so far as the plaintiff's premises were rented put an undervalue, and the disposal of the Dream Tex stock at a gross undervalue. I accordingly find D1 and D3 jointly and severally liable for breach of fiduciary duty in the sum of RM174,200 being the losses suffered by the plaintiff for the tenancies, as well as a sum of RM435,750 being the losses suffered from the disposal of the Dream Tex stock at an undervalue.

[107] I do not find D4 liable for these breaches because 1 accept his evidence that he was a not a director at the material time and in any event was a non-executive director who had no real knowledge of the operations of the plaintiff on a day to day basis.

[108] The plaintiff sought to submit in the course of trial that the directors were also guilty of carrying on the business of the plaintiff for a fraudulent purpose in breach of s. 304 of the Companies Act 1965. I make no finding on the same as this issue was not put to the directors nor any real evidence adduced in support of this contention.

[109] In summary therefore, D1 and D3 are jointly and severally liable to the plaintiff in the sum of RM609,950 being losses incurred by the plaintiff as a consequence of the acts of these directors amounting to breaches of fiduciary duty on their part. The costs of this action are to be borne by the two directors, D1 and D3.